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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1018

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN DEWALT MAZURIE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 487 F. 2d 14. The district court did not render an opinion. Its judgment of conviction with general findings (Pet. App. C) is not reported.

JURISDICTION

The judgments of the court of appeals (Pet. Apps. B1, B2, and B3) were entered on November 8, 1973. The petition and a motion for leave to file the petition out of time were filed on December 28, 1973. This Court granted the petition on February 25, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1154, which makes it a criminal offense to introduce spirituous liquor into Indian country, but excludes from the definition of Indian country "fee-patented lands in non-Indian communities," is unconstitutional as applied to respondents because the term "non-Indian community" is "indefinite and vague."

2. Whether Congress has the authority, under Article I, Section 8, Clause 3, and other provisions of the Constitution of the United States, to regulate and control the introduction of alcoholic beverages into Indian country, as defined by 18 U.S.C. 1151 and 1154.

3. Whether 18 U.S.C. 1161, which permits sales of spirituous liquor in Indian country if in accordance with state law and "an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the federal register," is an unconstitutional delegation of authority by Congress to the Indian tribes.

STATUTES INVOLVED

18 U.S.C. 1151 provides in pertinent part:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation * * *.

18 U.S.C. 1154 provides in pertinent part:

> (a) * * * whoever introduces or attempts to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.
>
> * * * * *
>
> (c) The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto.

18 U.S.C. 1161 provides:

> The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

STATEMENT

1. The Wind River Reservation is a major Indian reservation established by treaty in 1868 (Treaty of

July 3, 1868, 15 Stat. 673) located in central Wyoming and occupied jointly by the Arapahoe and Shoshone Indian Tribes (the Wind River Tribes). See *Shoshone Tribe* v. *United States,* 299 U.S. 476. As a result of various allotment Acts, there are scatterings of non-Indian held land within the reservation,[1] as is the case with many reservations.[2] Such non-Indian held lands "within the limits of any Indian reservation" are within the definition of "Indian country" in 18 U.S.C. 1151.

Prior to 1953, federal legislation generally prohibited sales of liquor to reservation Indians and the introduction of liquor into Indian country. See 18 U.S.C. 1154. See also United States Department of the Interior, *Federal Indian Law,* pp. 381–393 (1958). In 1953, however, Congress passed a local option Act which allowed Indian tribes, with the approval of the Secretary of the Interior, to permit the sale of liquor within Indian country (Act of August 15, 1953, 67 Stat. 586, 18 U.S.C. 1161). The Wind River Tribes, in response to the new law, adopted an ordinance in 1953 which permitted the sale of liquor within the Reservation if done in accordance with Wyoming law. Eighteen years later, in February 1971, that ordinance was superseded by a new ordinance (Ordinance No. 26), which was adopted by the Wind River Tribes, approved by the Secretary of the Interior, and published in the Federal Register on January 27,

[1] The Bureau of Indian Affairs informs us that of the 2,288,500 acres within the Reservation, 403,422 are owned by non-Indians.

[2] See *Seymour* v. *Superintendent,* 368 U.S. 351. *See also Mattz* v. *Arnett,* 412 U.S. 481.

1972 (37 Fed. Reg. 1253–1254, R. 54–55).[3] The new ordinance prohibits the sale of liquor within the Indian country under the Tribe's jurisdiction unless the seller has obtained a tribal license as well as a state license (Pet. App. A, p. 19; see also stipulation, A. 8).

2. The Blue Bull was a bar located on the Wind River Reservation on land owned by Blue Bull, Inc., a Wyoming corporation.[4] The corporation began operating the bar sometime after passage of the Tribe's 1953 ordinance under a retail liquor license issued by Fremont County, Wyoming (Pet. App. C, p. 33). The corporation is owned by respondent Margaret Mazurie and the bar was managed by her husband, Martin Mazurie (A. 8–10, 65; Pet. App. C, p. 33).

On April 3, 1972, several months after the official publication of Ordinance No. 26, an officer of the Bureau of Indian Affairs notified the Mazuries that they would be subject to criminal charges if they did not apply for a tribal liquor license (A. 9, 61–63), and on April 12, 1972, they applied (Pet. App. C, p. 33; A. 8; R. 56–58). The Tribes held a public hearing on the application on April 17, 1972, which Mr. Mazurie and the Mazuries' lawyer attended (R. 67–73).

At that hearing one witness testified that the people at the bar had been "singing all night, shooting guns

[3] "R" refers to the one-volume record on appeal, a copy of which has been lodged with the Clerk.

[4] The Blue Bull was closed when its stock was seized by federal agents (see p. 6, *infra*). We are informed by the attorney for the Tribes that it was reopened after the decision of the court of appeals, but that in April 1974, the County of Fremont refused to renew its license and it is again closed. The case is, of course, not moot because the criminal convictions of the respondents remain at issue.

over there and meeting" and protested granting the license (R. 67). Another witness testified that there had been twelve killings on the reservation, the majority of which had to do with alcohol (R. 67). The Chairman of the Council termed the bar "a public nuisance" (R. 68). The Chairman of the Tribes' housing committee testified that drunks from the bar wander into a nearby Indian housing development at all hours of the night disturbing elderly members "who would like to be left alone and they can't get their proper rest" (R. 68). There was also a discussion of the problem of Indian minors being permitted at the bar, which Mr. Mazurie apparently admitted to be a problem (R. 70–72). Respondents' counsel spoke in favor of the bar, arguing that the Mazuries would do better in the future, that other bars had not been closed, and that the license fee to the tribes for the bar would be from $300 to $1500 per year (R. 68–70). At the end of the hearing the application was denied (Pet. App. C, p. 33; R. 75).

For approximately three weeks following the denial of the tribal liquor license, the Mazuries closed the Blue Bull. They thereafter reopened it until June 13, 1973, when federal officers seized its alcoholic beverages (Pet. App. C, p. 33; A. 71).[5]

3. This prosecution was initiated on June 29, 1972, when the United States filed a criminal information in the United States District Court for the District of

[5] The information also charged Bonnie Ellen Velasquez with the same offense, but the court dismissed the charge as to her on the ground that she, unlike respondents, did not knowingly violate the statute. A. 7, Tr. 136–137 (Tr. refers to the one-volume trial transcript lodged with the Clerk).

Wyoming charging that "within the exterior boundaries of the Wind River Indian Reservation and within the Indian Country * * * [respondents] unlawfully, wilfully and knowingly did introduce * * * into the Indian Country malt and spirituous and vinous liquor and beer and ale and wine and ardent and intoxicating liquor" in violation of 18 U.S.C. 1154 (A. 5; R. 1).

The case was tried before a judge alone. The parties stipulated as to the ownership and management of the bar, its location on fee land within the Reservation, the passage and publication of Ordinance No. 26, and the application for and denial of a tribal license. They also stipulted that witnesses would testify that they had purchased liquor at the bar after the denial of a license (A. 8–10).

The evidence showed that the Blue Bull is not part of a right of way through an Indian reservation (A. 65).[6] As to whether it is located on "fee-patented lands in [a]non-Indian communit[y]" (18 U.S.C. 1154(c)), the evidence showed that it is located on a ten-acre tract of fee-patented land three quarters of a mile from Fort Washakie, Wyoming, the nearest village (A. 65, 31–32). Fort Washakie, an unincorporated village, is the location of the Wind River Indian Agency of the Bureau of Indian Affairs and of the tribal headquarters of the Wind River Tribes (A. 25, 69–70).

[6] 18 U.S.C. 1154(c) excludes from "Indian country" for the purposes of Section 1154 "* * * fee-patented lands in non-Indian communities or rights-of-way through Indian reservations * * *" (see p. 3, *supra*). The exclusion of rights-of-way from the definition allows liquor to be transported through reservations without tribal regulation.

The evidence further showed that in a 20-square mile area with Fort Washakie roughly in the center, there are 212 families, of which 170½ are Indian families and 41½ are non-Indian families (A. 28).[7] The superintendent of the state school district in which Fort Washakie is located testified that the district school is located about two and a half miles from the Blue Bull (A. 21) and that of a total of 243 students 223 are Indian (A. 20). Mr. Mazurie testified that the bar served both Indians and non-Indians; that there sometimes were "disturbances" at the bar; and that if the disturbance was by a non-Indian he would call the sheriff's office, and if it was by an Indian he would call the tribal police at Fort Washakie (Tr. 69–70, 113–114). No witness testified that the Blue Bull was located in a non-Indian community. Mr. Mazurie characterized the location by saying "We are kind of out there by ourselves, you know" (A. 70).

On the basis of this record, the district judge, who was also personally familiar with the area (Tr. 32), found that the Blue Bull was located in Indian country as defined in 18 U.S.C. 1151. The court held that Tribal Ordinance No. 26 was valid and that "The said defendants in dispensing intoxicants from the Blue Bull, Inc., absent a license from the Joint Business Council of the Shoshane and Arapohoe Tribes violated Section 1154 of Title 18, U.S.C." (Pet. App. C, p. 35). The respondents were convicted and each was fined $100 (A. 11–16).

[7] A mixed-marriage family was counted as ½ family in each category (A. 28).

The court of appeals reversed (Pet. App. A, pp. 18–28; 487 F. 2d 14). It did not find that respondents were selling liquor in a non-Indian community, but instead held:

> that the terminology of "non-Indian community" is not capable of sufficiently precise definition to serve as an element of the crime herein considered, aside from other factors or elements with similar infirmities. The statute is thus fatally defective by reason of this indefinite and vague terminology. [Pet. App. A, p. 24; 487 F. 2d at 18.]

As another basis for reversal, the court held that the provisions of 18 U.S.C. 1161, which permit the Indian tribes to set the criteria under which alcohol may be introduced into Indian country under their jurisdiction by adopting ordinances so providing,[8] constitute an improper congressional delegation of authority to the Indian tribes (Pet. App. A, pp. 26–27; 487 F. 2d at 18–19).

Finally, the court of appeals suggested[9] that Congress does not have the authority to regulate and control the sale of alcohol to Indians on fee-patented land owned by non-Indians within Indian reservations, stating: "It is obvious that the authority of Congress under the Constitution to regulate commerce with Indian Tribes is broad, but it cannot encompass the relationships here concerned" (Pet. App. A, p. 27; 487 F. 2d at 19).

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[8] The ordinance must be certified by the Secretary of the Interior and published in the Federal Register (18 U.S.C. 1161).

[9] See Pet. App. A, p. 26; 487 F. 2d at 18.

SUMMARY OF ARGUMENT

1. The court of appeals erred in holding that the exception for "non-Indian communities" in 18 U.S.C. 1154, which makes it a criminal offense to introduce spirituous liquor into Indian country, renders the statute unconstitutionally "indefinite and vague." This Court's decisions make it clear that in a case not involving First Amendment rights a statute should not be declared facially void for vagueness when in the case before the court the statute gives adequate warning of the conduct proscribed.

In the instant case not only is it clear that the respondents were not in a "non-Indian community" and thus were not excepted from the operation of the statute, but federal officials specifically warned them in advance that their sale of alcoholic beverages, without a tribal permit, would be a violation of 18 U.S.C. 1154. Thus, the statute is not unconstitutionally vague as applied to the respondents.

2. Article I, Section 8, Clauses 3 and 8 of the Constitution, which authorizes Congress to regulate commerce "among the several States, and with the Indian Tribes" and to enact all "laws which shall be necessary and proper for carrying into Execution * * * all * * * Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," provides Congress with authority to regulate and control the sale of liquor on Indian reservations, including sales by non-Indians on fee-patented lands. *Perrin* v. *United States*, 232 U.S. 478.

3. Congress may, with appropriate safeguards (as here), properly delegate to the Tribes the right to

control the sale of liquor within their reservations. Indian tribes are not simply private landowning organizations, as characterized by the court of appeals, but governmental entities possessing governmental powers, subject to the control of Congress. The delegation here, made in furtherance of Congress' trust responsibility and carefully circumscribed to protect the interests of non-Indians as well as those of the Tribes, is valid.

ARGUMENT

I

THE EXCEPTION PROVIDED FOR "NON-INDIAN COMMUNITIES" IN 18 U.S.C. 1154 DOES NOT MAKE THAT STATUTE UNCONSTITUTIONALLY VAGUE AS APPLIED TO THE RESPONDENTS

The court of appeals held that:

> the terminology of "non-Indian community" is not capable of sufficiently precise definition to serve as an element of the crime herein considered, aside from other factors or elements with similar infirmities. The statute is thus fatally defective by reason of this indefinite and vague terminology. [Pet. App. A, p. 24; 487 F. 2d at 18.] [10]

The court of appeals stated that while the term "non-Indian community" could properly apply to some towns and smaller communities within the Reservation, there was no proof that the Blue Bull

[10] The pertinent "element of the crime" here, of course, is "the Indian country" (18 U.S.C. 1154(a)), a term of art defined in 18 U.S.C. 1151. The term "non-Indian communities" is used only in 18 U.S.C. 1154(c) in providing for an exclusion of a portion of the Indian country from the applicability of Section 1154.

was within any community or what the standards for a community or Indian community are (Pet. App. A, pp. 23–24; 487 F. 2d at 17–18). In our view, there is no doubt in the application of the statutory terms to the facts of this case, and the court therefore should have affirmed the conviction rather than declared an Act of Congress unconstitutional for vagueness. "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker* v. *Levy*, No. 73–206, decided June 19, 1974, slip op., p. 22. See, also, *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610; *United States* v. *National Dairy Corp.*, 372 U.S. 29, 32–33; *United States* v. *Raines*, 362 U.S. 17, 21.[11]

There is, first, no basis for doubting that the respondents were properly apprised that their conduct, the sale of alcoholic beverages within the boundaries of the Wind River Reservation (obviously "Indian country" as defined in 18 U.S.C. 1151) without a tribal liquor license, was within the general proscription of 18 U.S.C. 1154 and 1161. Until 1953, 18 U.S.C. 1154 and 18 U.S.C. 1161 prohibited all sales of alcoholic beverages within Indian reservations whether on fee land or trust land and regardless of the wishes of the Tribes. The statutes were then amended to provide for tribal control of the introduction of liquor into the reservations, except in non-Indian communities. Under a tribal ordinance permitting sales by anyone possessing a state license, respondents began business.

[11] Since the statute at issue here in no way involves regulation of expression, this case presents none of the special requirements of drafting precision in that area. See, *e.g.*, *Coates* v. *City of Cincinnati*, 402 U.S. 611; *Smith* v. *Goguen*, No. 72–1254, decided March 25, 1974.

Then Ordinance No. 26, requiring Tribal licenses, was approved and published by the Secretary and respondents' application for a Tribal license was denied. Thereafter, respondents could not lawfully continue their liquor sales operation unless they were conducting it in a non-Indian community, within the meaning of the exception in 18 U.S.C. 1154(c).

Whatever difficulty might be imagined in applying this exception in some other situation, it is clear, as the district court found, that the Blue Bull is not in such a community. As the record shows (see the Statement, *supra*), the closest area which could be considered a "community" (in the ordinary meaning of the word) is Fort Washakie, three-quarters of a mile away, and it is clearly an Indian community: the Tribal headquarters and Indian Agency are there and within an area of 20 square miles, with Fort Washakie as the center, there are only some 212 families of which 170½ are Indian families. And if the Blue Bull is not in a "community" at all for purposes of the exception, then it is equally clear that the exception is inapplicable and the general proscription governs. Since there is thus no basis for considering the Blue Bull to be within the statutory exception for "non-Indian communities" the court of appeals erred in holding that respondents were not properly apprised that their conduct was prohibited by 18 U.S.C. 1154.

Moreover, after Ordinance No. 26, requiring Tribal licenses, was enacted, approved and published, the Ordinance and the fact that a failure to comply with its requirements would constitute a violation of 18 U.S.C.

1154 were specifically brought to the attention of Margaret Mazurie by the Special Agency Officer of the Wind River Reservation (A. 9). The respondents then applied for a tribal liquor license (A. 8–9), which was denied by the Joint Business Council of the Tribes (A. 9). The respondents then chose to sell alcoholic beverages at the Blue Bull in open defiance of the rejection of their application for a license, and were prosecuted for doing so. On the facts of this case, therefore, there is no realistic basis for the court of appeals' holding that respondents were denied fair warning that their conduct was proscribed by the statute.

II

CONGRESS MAY CONSTITUTIONALLY REGULATE OR PROHIBIT THE SALE OF SPIRITUOUS LIQUOR ON FEE-PATENTED LANDS OWNED BY NON-INDIANS BUT LOCATED WITHIN INDIAN RESERVATIONS

The court of appeals, without citation of authority, stated that it doubted that Congress has the constitutional authority to regulate a business on unencumbered fee land within an Indian reservation (Pet. App. A, p. 26; 487 F. 2d at 18). This doubt, which may have influenced other aspects of the decision, is unwarranted.

Article I, Section 8 of the Constitution gives Congress "* * * Power * * * to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes * * *." See, generally, *Morton* v. *Mancari*, No. 73-362, decided June 17, 1974, slip op., pp. 16–20. This power, as this Court has repeatedly held, encompasses the power to prohibit

or regulate the sale of alcoholic beverages to tribal Indians, and to prohibit or regulate its introduction into Indian country at all. *United States* v. *Holliday*, 3 Wall. 409, 417–418; *United States* v. *43 Gallons of Whiskey, Etc.*, 3 Otto 188, 194–195; *Ex parte Webb*, 225 U.S. 663, 683–684; *United States* v. *Wright*, 229 U.S. 226, 237–238; *Perrin* v. *United States*, 232 U.S. 478, 482; and *United States* v. *Nice*, 241 U.S. 591, 597.

Moreover, in *United States* v. *Perrin*, *supra*, this Court expressly held that Congress has power to prohibit the sale of intoxicating liquors on privately held land in an Indian Reservation, or even in an area ceded by a Tribe to the United States, but adjacent to a Reservation. Perrin, a non-Indian, was convicted of violating the Act of August 15, 1894, 28 Stat. 319, by selling intoxicating beverages within his premises on privately held land in the town of Dante, an organized municipality, located on lands ceded by the Yankton Sioux. In upholding the validity of the challenged statute, this Court stated (232 U.S. at 482):

> The power of Congress to prohibit the introduction of intoxicating liquors into an Indian reservation, wheresoever situate, and to prohibit traffic in such liquors with tribal Indians, whether upon or off a reservation and whether within or without the limits of a State, does not admit of any doubt. It arises in part from the clause in the Constitution investing Congress with authority "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," and in part

> from the recognized relation of tribal Indians to the Federal Government. * * *

The court of appeals therefore erred in suggesting that the United States is without constitutional authority to regulate the sale of alcoholic beverages on fee-patented land owned by non-Indians within the exterior boundaries of an Indian reservation. Ample power for such regulation is conferred on Congress by Article I, Section 8, Clauses 3 and 8 of the Constitution, which authorizes it to enact all laws "necessary and proper for carrying into Execution * * * all * * * Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," including the power to regulate commerce "among the several States, and with the Indian Tribes," the treaty power, and the proprietary powers of Article IV, Section 3. See *Perrin, supra*, 232 U.S. at 482–485; see also *Worcester* v. *Georgia*, 6 Pet. 515, 559; *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685.

III

18 U.S.C. 1161 IS NOT AN UNCONSTITUTIONAL DELEGATION OF AUTHORITY TO THE INDIAN TRIBES

As an additional basis for reversing the respondents' convictions, the court of appeals, without citation of authority, held that if Congress has the power to regulate the respondents' conduct, the provisions of 18 U.S.C. 1161, which in effect permit the various Indian tribes to control the introduction of liquor into their reservations, constitute an improper

delegation of congressional authority (Pet. App. A, pp. 26–28; 487 F. 2d at 18–19).

As we have shown in point II above, Congress does have the requisite constitutional authority to regulate or prohibit the respondents' conduct. Its constitutional authority to permit an Indian tribe to regulate the introduction of liquor into its Reservation is, in our view, also clear.

Control of the sale of alcohol within reservation boundaries is of extreme importance to the Indian tribes. While alcoholism is a problem throughout the country, it is a particularly serious problem for Indians. The alcoholism death rate for Indians in recent years has been approximately five times the rate for the country as a whole. National Institutes of Health, *Suicide, Homicide and Alcoholism among American Indians*, pp. 25–31 (1973). Of equal significance, the Bureau of Indian Affairs informs us that more than 95 percent of all crimes on Indian reservations are committed by persons under the influence of alcohol. These problems have long been a matter of great concern to tribal governments. Indeed, Cohen notes that "the first federal control measure was enacted, at least in part, in response to the verbal plea of an Indian chief to President Thomas Jefferson on January 4, 1802." [12]

In striking down Congress' limited delegation of power to the tribes under the present statutory scheme (to grant exceptions to the congressional prohibition within the boundaries of their own reservations), the

[12] Department of the Interior, *Federal Indian Law*, p. 381 (1958 ed.).

court of appeals, in our view, misconceived both the legal attributes of an Indian tribe and the power of Congress to make appropriate delegations of authority in a regulatory statute.

1. The court of appeals' opinion characterizes Indian tribes as private, voluntary organizations possessing no attributes of sovereignty and without authority, except as a landowner, over non-members within their reservations (Pet. App. A, pp. 25–28; 487 F. 2d 18–19). This characterization is incorrect. Indian tribes are not simply private land owning organizations,[13] but governmental units which are, in most instances, parties to treaties with the United States and which the United States Constitution treats *in pari materiae* with states and foreign nations. Article I, Section 8, Clause 3. See *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 168–173.

A Tribe's authority over non-Indians within a reservation is necessarily limited. Non-Indians are not represented in the tribal government (though they are, of course, represented in the federal government which has ultimate control over the Tribe). But where essential Indian interests are at stake, such as in a suit by a non-Indian against an Indian regarding transactions on a reservation (*Williams* v. *Lee*, 358 U.S. 217) or control of hunting and fishing rights within a reservation (*Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 87; *Quechan Tribe* v. *Rowe*, 350 F. Supp. 106 (S.D. Cal.), the Tribe's jurisdiction over non-Indians is recognized. The regulation

[13] They are, of course, typically beneficial owners of lands held in trust by the United States.

of liquor on the reservation is no less an important Indian interest.

Indeed, there is a strong case, in our view, that even without a delegation of authority from Congress, a Tribe, unless prevented by Congress, would have the right to regulate the introduction of liquor within its reservation.[14] But the Court need not reach that question, for Congress has expressly delegated to the Tribes the authority here exercised. Our point is that this delegation is not to a private body, or trade organization, but to an appropriate governmental unit.

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[14] In *Morris* v. *Hitchcock*, 194 U.S. 384, the Supreme Court upheld the right of a tribe to require a permit fee of $25 per year from non-members of the tribe for the privilege of grazing cattle on reservation land and, in *dicta*, the right to charge license fees for doing business within a reservation so long as approved by the President and not prohibited by Congress. The Court quoted with approval from opinions of two Attorneys General stating "Purchasers of lots do so with notice of existing Indian treaties * * * [s]uch lands are sold under the assumption that the purchasers will comply with the local laws." *Id.* at 391–392. *Morris* was followed in *Buster* v. *Wright*, 135 Fed. 947, 950 (C. A. 8), appeal dismissed, 203 U.S. 599, which held that a merchant can be required by tribal ordinance to pay a permit tax to a tribe as a condition precedent to doing business on his privately owned land within a reservation. The court of appeals said:

"The authority of the Creek nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origins in any act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. * * * The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress or by the contracts of the Creek Tribe itself."

See also *Iron Crow* v. *Oglala Sioux Tribe of the Pine Ridge Reservation*, 231 F. 2d 89 (C.A. 8).

2. In 1832, after regulation primarily through the Executive power to make treaties and to license traders, Congress enacted the first general prohibition of the sale of liquor to Indians. Act of July 9, 1832, 4 Stat. 564. By 1938,[15] two rigid prohibitions had been established. First, it was illegal to sell or otherwise make liquor available to any Indian who was a ward of the government. This prohibiton had no geographic limitation and thus applied equally in Washington, D.C., Phoenix, Arizona, or an Indian reservation. Second, it was illegal to introduce or attempt to introduce any intoxicant into Indian country. In 1949, for the benefit of non-Indians, rights-of-way and non-Indian communities were excepted from the definition of Indian country as applied to the liquor prohibitions. Act of May 24, 1949, 63 Stat. 89, 94, 18 U.S.C. 1154(c). But the absolute prohibitions relative to Indians remained—prohibitions which gave no consideration to differences in the desires or cultural (or physical) situations of the various tribes, or of individual Indians.

In 1953, in response to complaints that the then existing scheme was discriminatory against Indians, Congress enacted the Act of August 15, 1953, 67 Stat. 586, entitled "An act to eliminate certain discriminatory legislation against Indians in the United States." The Act provided that the various prohibitions against sale of liquor to Indians shall not apply outside of Indian country "nor to any act or transaction within

[15] See generally *Federal Indian Law*, *supra*, at 386–390; see also Act of July 23, 1892, 27 Stat. 260, as amended by Act of June 15, 1938, 52 Stat. 696.

any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior and published in the Federal Register." In other words, with the requirements that the transactions be in accord with state laws and that the enabling ordinance be approved by the Secretary of the Interior and published, Congress returned to the tribes a measure of self-government concerning the use of liquor in their reservations.

The Department of the Interior supported the Act, stating, in a letter (from the Assistant Secretary of the Interior) included in both the House and Senate Reports:[16]

> I consider the laws which prohibit the sales of intoxicants to Indians as discriminatory and agree that these laws should be made inapplicable to transactions occurring outside of Indian country * * *. I also believe that the laws should be made inapplicable to transactions occurring within the Indian country, but only if such transactions are in conformity with the ordinances of the tribes concerned and are not contrary to State law.

The Act was passed without floor debate. In a later letter[17] from the Assistant Secretary to the Bureau of the Budget urging the President to sign the Act,

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[16] H. Rep. No. 775, 83d Cong., 1st Sess. 2–3; S. Rep. No. 722, 83d Cong., 1st Sess. 2.

[17] Copies of this letter have been lodged with the Clerk and furnished to opposing counsel.

the Department described the purpose of the Act in more detail, emphasizing its local option feature:

> The effect of this second change in the Indian liquor laws would be to place these laws on a local option basis. If the Indians on a given reservation wish Federal prohibition to continue on that reservation, all they have to do is to refrain from adopting an ordinance to the contrary. If, on the other hand, they wish to terminate Federal prohibition, in whole or in part, they have only to adopt an ordinance specifying what transactions in intoxicating liquors they wish to permit on their reservation. These transactions will thereupon cease to be subject to the Indian liquor laws if, and only if, they are permitted by the liquor laws of the State where the reservation is situated. Thus, the bill recognizes the principle of tribal self-government, but requires that it be exercised in a manner consistent with the public policy of the State.

The bill, of course, also required consent of the Secretary and publication in the Federal Register.

This delegation was within the power of Congress to make all laws necessary and proper for the exercise of its powers in this field (p. 14–16, *supra*). This Court has repeatedly recognized the propriety of congressional delegations of authority, with appropriate safeguards, in the enactment of regulatory legislation. See, *e.g.*, *United States* v. *Howard*, 352 U.S. 212; *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381. See, generally, Davis, *Administrative Law*, pp. 74–76, 152–158 (1965).

Combatting alcoholism on reservations is an appropriate congressional concern (see point II, *supra*), as

is fostering the powers of tribal government, and thus of Indian responsibility for matters significantly affecting tribal Indians. See *Morton* v. *Mancari, supra.* See, also, the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. 461, *et seq.* The Acts in question here combine those two purposes, in making a limited delegation of authority to the Tribes in a manner which preserves rights of non-Indians and which provides for government supervision over the Tribes' actions. The rights of non-Indians within Indian country are protected by 18 U.S.C. 1154(c) which exempts rights-of-way, and fee patented lands within non-Indian communities, from the liquor prohibtion, even though these exemptions may be contrary to the Tribes' wishes, and by 18 U.S.C. 1154, which allows the Tribes to permit introduction of liquor into Indian country only if it does not violate state law. Federal supervision is preserved by the requirement that the tribal regulation be approved by the Secretary of the Interior and published in the Federal Register.

In the exercise of its responsibility to the Indian tribes as their guardian, it is highly appropriate for Congress to provide for meaningful participation by the Tribes in determining what is in their own best interest, as was done here. In light of the broad authority of Congress in fulfilling its trust responsibility (see *Board of Commissioners* v. *Seber,* 318 U.S. 705, 715–719; *Morton* v. *Mancari, supra*), the carefully delimited delegation (or return) of authority to the Tribes at issue here was well within Congress' legislative power.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974